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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

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ET Docket No. 92-9

To: The Commission

PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

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Summary

UTC generally supports the Commission's "transition framework" as providing a mechanism to reallocate the 2 GHz band to emerging technologies while ensuring that existing users of the band emerge from the proceeding "whole" both operationally and financially.

However, in order to ensure that this transition framework adequately protects existing 2 GHz private microwave users, UTC urges the Commission to clarify that existing microwave users will not be required to relocate to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities. Similarly, the Commission should clarify that the replacement system should be a private communications system, owned and controlled by the incumbent microwave licensee. The FCC is also requested to clarify that the incumbent microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities.

Finally, the Commission is asked to clarify that its exemption for state and local governments applies to all state and local government agencies.

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PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits this Petition for Clarification and/or Reconsideration of the First Report and Order (R&O) in ET Docket No. 92-9, FCC 92-437, released October 16, 1992, regarding the above captioned matter.^{1/} UTC generally supports the rules adopted in the R&O, subject to some minor modifications detailed below.

I. Introduction

UTC is the national representative on communications matters for the nation's electric, gas, water, and steam utilities. Approximately 2,000 utilities are members of UTC, ranging in size from large combination electric-gas-water utilities serving

^{1/} The R&O was published in the Federal Register on Thursday, October 29, 1992, 57 Fed. Reg. 49020. Thus, this petition is timely filed, being within the specified time period under FCC Rule Sections 1.4(b) and 1.429(d).

millions of customers to small, rural electric cooperatives and water districts serving only a few thousand customers. All utilities depend upon reliable and secure communications facilities in carrying out their public service obligations.

Many utilities operate extensive private microwave systems to meet these communications requirements. Utilities rely heavily on private microwave facilities operating in the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz (2 GHz) bands, and would be severely hampered in their ability to provide vital public services if they were forced to vacate these bands without adequate replacement spectrum with equivalent reliability to which they could migrate their systems. Thus, UTC has been an active participant in this proceeding and the related proceedings dealing with the continued use of the 2 GHz band for fixed microwave.

In its R&O the Commission reallocated 220 MHz from the 2 GHz microwave band in order create a "spectrum reserve" for emerging technologies, such as personal communications services (PCS). An integral part of the FCC's reallocation of the 2 GHz band was the adoption of a "transition framework" to minimize disruption to on-going operations of incumbent 2 GHz fixed microwave licensees.

II. Aspects of the Transition Framework Must Be Clarified or Amended in Order to Protect the Integrity of the Public Services that 2 GHz Microwave Systems Support

Although UTC generally concurs with the transition framework adopted by the FCC, there are a number of details in the transition plan that need to be clarified or amended in order to fully protect the integrity of the public services that 2 GHz microwave systems now support. As the FCC acknowledged in adopting the R&O, 2 GHz microwave operations provide "important and essential functions, such as public safety and utility management communications..."^{2/} Thus, the transition plan must provide for replacement microwave systems that, at a minimum, provide the same degree of reliability as existing 2 GHz microwave systems.

A. Replacement Facilities Must Be Microwave Systems

Throughout this proceeding UTC has objected to any relocation of 2 GHz microwave users to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities. As UTC and others have noted, fiber optics and satellite communications do not provide a sufficient degree of reliability to act as a wholesale replacement for 2 GHz microwave systems. UTC is therefore pleased that in the text of the R&O the FCC states: "[W]e are not requiring any system to convert to alternative media, but rather, have provided sufficient spectrum

^{2/} First Report and Order and Third Notice of Proposed Rulemaking in ET Docket No. 92-9, FCC 92-437, released October 16, 1992, at para. 21.

to accommodate those 2 GHz licensees that relocate to higher frequencies."^{3/} Yet, in examining the actual rules adopted in the R&O, as contained in Appendix A, Section 94.59(b)(1), it appears that after the expiration of the voluntary negotiation period an emerging technology service provider could force an existing 2 GHz microwave user to relocate to either "another fixed microwave band or ... another medium."

In order to make the rules consistent with the intent of the Commission as indicated by the text of the R&O, and to avoid any ambiguity, UTC urges the Commission to amend its rules to clarify that an incumbent 2 GHz microwave user may not be moved to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities.^{4/}

**B. Private 2 GHz Replacement Facilities
Must Be Privately Owned by Incumbent**

Another aspect of the FCC's transition plan that must be clarified is the need for 2 GHz private microwave replacement facilities to be private communications systems, owned and controlled by the incumbent private microwave licensee. The FCC (or an arbitrator) should not re-engineer or second-guess an incumbent's choice of medium, i.e., if an entity has selected private microwave for its communications system, then it should

^{3/} R&O para. 19.

^{4/} Appendix A contains a proposed revision to section 94.59.

be entitled to private microwave replacement facilities. UTC therefore urges the FCC to clarify that an incumbent private 2 GHz microwave user may only be moved to private replacement facilities, unless the incumbent specifically agrees to accept service from a common carrier, private carrier, or other third-party.

**C. Replacement Facilities Must Be
Constructed By Incumbent**

As part of the involuntary relocation framework the Commission has adopted a requirement that the emerging technology licensee must "build[] the replacement microwave system and test[] it for comparability with the existing 2 GHz system."^{5/} UTC objects to this requirement. PCS licensees and other emerging technology licensees are not necessarily familiar with or well-suited to construct microwave systems. Moreover, often utilities are not using 2 GHz microwave systems for standard voice or data applications but instead are using these systems for instantaneous control of utility systems such as high voltage transmission facilities. Thus, utilities require precision engineering, construction and testing of their facilities. Utilities are also selective about contractors working on or near their facilities due to safety and liability considerations.

^{5/} R&O Appendix A, Section 94.59(b)(3).

Accordingly, UTC suggests that the Commission amend its rules to clarify that while the emerging technology licensee must bear the costs, the incumbent 2 GHz microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities. Such oversight authority should include the right of the incumbent to engineer, build and test the replacement facilities itself or to select the contractors. The emerging technology entity would have the right to require the incumbent to justify costs incurred, and would be entitled to periodic status reports.^{6/}

III. The Commission Must Clarify/Amend Rules on Exemption of State and Local Government 2 GHz Licensees

In the Commission's NPRM in this proceeding the FCC recognized that state and local government agencies would face special economic and operational considerations in relocating their 2 GHz fixed microwave operations. Therefore to address these concerns the Commission proposed to exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods, and to allow these facilities to continue to operate in the 2 GHz band on a co-primary basis indefinitely.^{7/}

State-and municipally-owned electric, gas and water utilities rely extensively on microwave facilities in the 2 GHz

^{6/} Appendix A contains suggested Rule language.

^{7/} NPRM, para. 25.

band for day-to-day operations and for critical communications during emergency situations. Accordingly, UTC's Comments and Reply Comments in this proceeding supported the FCC's proposed exemption for all incumbent state and local government licensees.

UTC is therefore concerned that the FCC's final rule may have inadvertently restricted this exemption to "public safety licensees," and not to all state and local government licensees, such as public power agencies. For example, paragraph 26 of the R&O indicates that the FCC will exempt systems:

licensed to the public safety and special emergency radio services -- including state and local governments, police, fire, and medical emergency communications -- from any involuntary relocation.

Moreover, Appendix A, new Rule Section 94.59(b), only lists "public safety licensees" as being exempt from the Commission's mandatory relocation provisions.

To restrict the exemption to "public safety" entities at this late stage would be inconsistent with the Commission's proposal. Throughout this proceeding the FCC has indicated that the proposed exemption was inclusive of all state and local government agencies licensed in the 2 GHz band, irrespective of specific agency functions. Commission actions subsequent to the adoption of the NPRM reinforced this conclusion. For example, in a May 20, 1992, letter to Senator Alan Cranston, the FCC's Chief Engineer assured the Senator that the Commission's proposal would

"permit state and local government licensees such as Metropolitan Water District of Southern California to continue their operations indefinitely on a primary basis."^{8/} Further, the September 17, 1992, New Release that the Commission issued upon adoption of the R&O stated that "2 GHz fixed microwave operations licensed to state and local governments, including public safety, would be exempt from any involuntary relocation."^{9/} UTC therefore urges the Commission to clarify, that consistent with its original proposal, the exemption includes all state and local government incumbents.

Under the FCC's Rules eligibility to operate a private microwave system is based on the applicant's eligibility to hold a license under Part 90 in the Private Land Mobile Radio Service.^{10/} Under Part 90, a state or municipal utility is eligible to hold a license in either the Local Government Radio Service (one of the Public Safety Radio Services) as a state or

^{8/} Letter from Dr. Thomas P. Stanley to Senator Alan C. Cranston, May 20, 1992.

^{9/} While news releases are generally not to be relied upon as official Commission action, the Conference Report accompanying H.R. 5678 specifically cited the FCC's news release as the basis for its decision to delete the "Hollings" amendment from the final language of the FCC's appropriations bill. The Report stated that "[t]he conferees expect that the text of the Commission's decision will reflect the decision announced by the Commission in its press release of September 17, 1992," 138 Cong. Rec. H9569 (1992).

^{10/} 47 C.F.R. § 94.5

local government agency^{11/}, or in the Power Radio Service (one of the Industrial Radio Services) as a utility service provider^{12/}. As a practical matter, it is often the utility department of a municipality that operates the municipality's telecommunications department, and therefore it is not uncommon for a municipality to license its microwave system on the basis of its eligibility under the Power Radio Service. Thus, while incumbent state and local government utilities operating in the 2 GHz band could arguably qualify for the FCC's exemption by amending their station licenses to change the basis of their private microwave radio eligibility from Power Radio to Local Government, this would appear to impose an inefficient and unnecessary burden on licensees and the FCC's licensing staff.^{13/} Instead, the FCC should amend its transition Rules to explicitly state that the exemption covers all incumbent state and local government licensees, including public safety entities, from any mandatory relocation.^{14/}

^{11/} 47 C.F.R. § 90.17

^{12/} 47 C.F.R. § 90.63

^{13/} It is debatable whether license modification is necessary or appropriate since eligibility is not a license condition per se.

^{14/} Appendix A contains suggested Rule language.

IV. Conclusion

UTC generally supports the Commission's "transition framework" as providing a mechanism to reallocate the 2 GHz band to emerging technologies while ensuring that existing users of the band emerge from the proceeding "whole" both operationally and financially.

However, in order to ensure that this transition framework adequately protects existing 2 GHz private microwave users, UTC urges the Commission to clarify that existing microwave users will not be required to relocate to non-microwave replacement facilities unless the incumbent specifically agrees to the use of such facilities. Similarly, the Commission should clarify that the replacement system should be a private communications system, owned and controlled by the incumbent microwave licensee. The FCC is also requested to clarify that the incumbent microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities.

Finally, the Commission is asked to clarify that its exemption for state and local governments applies to all state and local government agencies.

WHEREFORE, THE PREMISES CONSIDERED, the Utilities
Telecommunications Council respectfully requests the Commission
to take actions consistent with the views expressed herein.

Respectfully submitted,

UTILITIES TELECOMMUNICATIONS
COUNCIL

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November 30, 1992

APPENDIX A
Proposed Rule Clarification
(New language is underlined deleted language is ~~interlined~~)

Section 94.59 Transition of the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.

* * *

(b) Private Operational-Fixed Microwave Service licensees will maintain primary status in these bands until [Date: end of transition period to be determined in the Second Report and Order]. After [Date] Private Operational-Fixed Microwave Service licensees will maintain primary status in these bands unless and until an emerging technology service licensee requests mandatory relocation of the fixed microwave licensee's operations in these bands; however, ~~public safety licensees~~ licensees eligible to be licensed in any of the Public Safety Radio Services or the Special Emergency Radio Service will be exempt from any mandatory relocation. The Commission will amend the operating license of the fixed microwave licensee to secondary status if the following requirements are met:

(1) The service licensee using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of private operation in another fixed microwave band or, if the licensee consents, migration to another medium;

(2) The emerging technology service licensee ~~completes~~ bears the cost of all activities necessary for implementing the new private microwave facilities, including identifying and obtaining, ~~on the incumbents' behalf~~, new microwave frequencies, engineering the system, and coordinating the new frequencies, as well as any cost analysis necessary to complete the relocation procedure;

(3) ~~The emerging technology service licensee builds the new microwave system and tests it for comparability with the existing 2 GHz system~~ incumbent 2 GHz private microwave licensee has the right to oversee the preparation of the replacement facilities, including the right to engineer, construct, and test the replacement facilities itself or to select the contractors; however, the emerging technology service licensee may require the 2 GHz microwave licensee to justify costs incurred, and is entitled to periodic status reports;

(4) The 2 GHz microwave licensee is not required to relocate until the comparable alternative facilities are available to it for a reasonable time to make adjustments and ensure a seamless handoff; and

(5) If within one year after the transition to new facilities the 2 GHz microwave licensee demonstrates that they are not comparable to the former facilities, the emerging technology service provider must remedy the defects or pay to relocate the microwave licensee back to its former 2 GHz frequencies.